

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF KENTUCKY

THE UNITED STATES OF AMERICA, )  
THE COMMONWEALTH OF )  
KENTUCKY, on behalf of the )  
ENVIRONMENTAL AND PUBLIC )  
PROTECTION CABINET, )

Plaintiffs, )

v. )

Civil Action No. 06-102-KSF

WINCHESTER MUNICIPAL UTILITIES, )

Defendant. )

THE UNITED STATES OF AMERICA, )  
THE COMMONWEALTH OF )  
KENTUCKY, on behalf of the )  
ENVIRONMENTAL AND PUBLIC )  
PROTECTION CABINET, )

Plaintiffs, )

v. )

Civil Action No. \_\_\_\_\_

CITY OF WINCHESTER, KENTUCKY )

Defendant. )

**CONSENT DECREE**

The Parties to this Consent Decree, the United States of America, on behalf of the United States Environmental Protection Agency ("United States"), the Commonwealth of Kentucky, on behalf of its Environmental and Public Protection Cabinet ("Commonwealth"), the City of Winchester, Kentucky ("City") and Winchester Municipal Utilities ("WMU") state:

## **I. RECITALS**

1. The Environmental Protection Agency (“EPA”) is charged with the statutory duty of enforcing the CWA pursuant to 33 U.S.C. § 1251 *et seq.*, and the regulations promulgated pursuant thereto, and specifically the NPDES program set forth in Section 402 of the Federal Water Pollution Control Act, as amended (“Clean Water Act” or “CWA”), 33 U.S.C. § 1342.

2. The Environmental and Public Protection Cabinet (“Cabinet”) is charged with the statutory duty of enforcing Kentucky Revised Statutes (“KRS”) Chapter 224 and the regulations promulgated pursuant thereto, and has been authorized to administer the National Pollutant Discharge Elimination System (“NPDES”) pursuant to Section 402(b) of the CWA, 33 U.S.C. § 1342(b).

3. WMU is a public service utility organized and established by the City pursuant to KRS Chapter 58. WMU is responsible for management, collection, transmission and treatment of sanitary wastewater within the City of Winchester, Kentucky, and in some surrounding areas of Clark County, Kentucky. The City is a municipality organized under the laws of the Commonwealth of Kentucky.

4. Together, the City and WMU own and operate a wastewater collection and transmission sewer system in Winchester, Kentucky, and portions of Clark County, Kentucky. The City and WMU assess user fees to implement their sanitary programs. The wastewater collection and transmission system is separate from the City’s stormwater collection system. The wastewater collection and transmission system transports wastewater to the Strodes Creek Wastewater Treatment Plant (“WWTP”) owned and operated by the City and WMU pursuant to KPDES Permit No. KY0037991.

5. WMU has reported to EPA and the Cabinet that it has identified 27 locations, set forth in Exhibit A, at which reoccurring SSOs have been documented. In addition, WMU has reported to EPA and the Cabinet that it is diverting the flow of wastewater around its WWTP during peak flow events, resulting in Unpermitted Bypasses. The United States and the Commonwealth contend that these SSOs and Unpermitted Bypasses are violations of the CWA, the Commonwealth's regulations implementing the CWA, and the KPDES permit issued to WMU.

6. The United States filed a complaint against WMU on April 7, 2006 under Section 309(b) of the CWA, 33 U.S.C. § 1319(b), alleging that WMU violated and continued to violate Section 301 of the CWA, 33 U.S.C. § 1311. At the time that it lodged this Consent Decree with the Court for a period of public comment, the United States filed a second complaint against the City under Section 309(b) of the CWA, 33 U.S.C. § 1319(b), alleging that the City violated and continued to violate Section 301 of the CWA, 33 U.S.C. § 1311. Both complaints named the Commonwealth of Kentucky as a party plaintiff pursuant to Section 309(e) of the CWA, 33 U.S.C. § 1319(e). Concurrent with the filing of the second complaint, the United States and the Commonwealth lodged this Consent Decree addressing SSOs and Unpermitted Bypasses. All Parties agree that this Court has jurisdiction over this civil action pursuant to the CWA.

7. This Consent Decree requires the City and WMU to develop, submit, finalize and implement plans for the continued improvement of the wastewater collection and transmission system and the WWTP, and the elimination of SSOs and Unpermitted Bypasses.

8. The City and WMU neither admit nor deny the alleged violations of the CWA as set forth in the complaints, but accept civil liability for those violations under the terms and conditions of this Consent Decree.

9. The Parties agree, without adjudication of facts or law, that settlement of the claims of the United States in accordance with the terms of this Consent Decree is in the public interest and have agreed to entry of this Consent Decree without trial of any issues, and the Parties hereby stipulate that, in order to resolve these claims stated in the complaints, this Consent Decree should be entered.

NOW THEREFORE, in the interest of settling and resolving all civil claims and controversies involving the alleged violations described above and in the complaints before taking any testimony and without adjudication of any fact or law, the Parties hereby consenting to the entry of this Consent Decree; and the Court hereby finding that settlement of the claims alleged without further litigation or trial of any issues is fair, reasonable and in the public interest and the entry of this Consent Decree is the most appropriate way of resolving the claims alleged, IT IS HEREBY ORDERED, ADJUDGED, and DECREED as follows:

## **II. JURISDICTION AND VENUE**

10. This Court has jurisdiction over the subject matter of this action, and over the Parties hereto, pursuant to Section 309 of the CWA, 33 U.S.C. §§ 1319, and 28 U.S.C. §§ 1331, 1345, 1355. Venue is proper in the Eastern District of Kentucky pursuant to Section 309 of the CWA, 33 U.S.C. § 1319, and 28 U.S.C. §§ 1391(b) and 1395(a).

## **III. APPLICATION AND SCOPE**

11. The provisions of this Consent Decree shall apply to and be binding upon the Parties to this action, and their agents, employees, successors, and assigns, as well as to all persons acting under the direction and/or control of the City and WMU, including firms, corporations, and third parties such as contractors engaged in implementation of this Consent Decree.

12. The City and WMU shall provide a copy of this Consent Decree to any consultant or contractor selected or retained to perform any activity required by this Consent Decree.

## **IV. OBJECTIVES**

13. It is the express purpose of the Parties in entering this Consent Decree to further the objectives of the CWA, as stated in Section 101 of the CWA, 33 U.S.C. § 1251, and to eliminate SSOs and Unpermitted Bypasses. All plans, reports, construction, remedial maintenance, and other obligations in this Consent Decree or resulting from the activities required by this Consent Decree, and under any amendment to this Consent Decree, shall have the objective of insuring that the City and WMU comply with the CWA, all applicable federal and state regulations, and the terms and conditions of

**V. DEFINITIONS**

14. "Date of Entry" shall mean the date on which this Decree is entered by the United States District Court for the Eastern District of Kentucky.

15. "Deliverable" shall mean any written document required to be prepared and/or submitted by or on behalf of the City and WMU pursuant to this Decree.

16. "Capacity, Management, Operations, and Maintenance" or "CMOM" shall mean, for the purpose of this Consent Decree only, a flexible program of accepted industry practices to properly manage, operate and maintain sanitary wastewater collection, transmission and treatment systems, investigate capacity-constrained areas of these systems, and respond to SSO events.

17. "Major System Component" shall be defined as the watershed interceptor or backbone sewer and branches from the watershed interceptor sewer that are 12 inches or greater in size and any pump station and force main sewer downstream and serving the watershed interceptor or branch sewer. Any sanitary sewer smaller than 12 inches in diameter or pump station / force main sewer serving such sanitary sewer shall not be considered to be a part of the major system.

18. "Minor Sewer Connection" shall mean (a) the extension of an 8-inch sanitary sewer line not more than 150 feet and may include or not include a manhole and which will not serve more than one single family house or the equivalent flow; or (b) the connection of an undeveloped lot for which sanitary sewer service was planned and considered in the design of the sanitary sewer serving that proposed lot and for which the original planned use and wastewater flow has not changed. A Minor Sewer Connection shall not include the connection of a developed property that previously was connected to

the POTW but has been redeveloped with a change in use that results in a wastewater flow greater than which was originally planned or designed.

19. “Sanitary Sewer Overflow” or “SSO” shall mean, for the purpose of this Consent Decree only, any discharge to waters of the United States from the Sewer System owned and operated by the City and WMU through point sources not specified in any KPDES permit (otherwise known as “Unpermitted Discharges”), as well as any release of wastewater from the Sewer System to public or private property that does not reach waters of the United States, such as a release to a land surface or structure that does not reach waters of the United States; provided, however, that releases or wastewater backups into buildings that are caused by blockages, flow conditions, or malfunctions in a building lateral, or other piping or conveyance system that is not owned or operationally controlled by the City and WMU are not SSOs for the purposes of this Consent Decree.

20. “Sewerbasin” shall mean a drainage area in which all wastewater flows are conveyed to a single point or outlet, by either gravity or pumping, before being conveyed elsewhere. Each Sewerbasin is hydraulically independent of other Sewerbasins, unless otherwise noted. For purposes of this Consent Decree only, WMU's Sewerbasins are: Lower Howard Creek Basin A, Lower Howard Creek Basin B, Lower Howard Creek Basin C, Four Mile Creek Basin A, Four Mile Creek Basin B, Four Mile Creek Basin C, Strodes Creek Basin A, Strodes Creek Basin B, Strodes Creek Basin C, Strodes Creek Basin D, Hancock Creek Basin A, Hancock Creek Basin B, Hancock Creek Basin C, and Hoods Creek Basin, as depicted on ***Exhibit B***.

21. “Sewer System” shall mean the wastewater collection, retention, and transmission system owned or operated by the City and WMU designed to collect and convey municipal sewage (domestic, commercial and industrial) to the WWTP. The Sewer System does not include any sewer systems that are not owned by the City or WMU.

22. “Unpermitted Bypass” shall mean any discharge to the waters of the United States from the WWTP which constitutes a prohibited bypass as defined in 40 C.F.R. § 122.41(m).

23. “WWTP” shall mean the wastewater treatment plant located at 2033 Van Meter Road, Winchester, Clark County, Kentucky, which discharges to Strode’s Creek at mile point 21.75 (Outfall 001) and 21.50 (Outfall 002) pursuant to KPDES Permit No. KY0037991.

## **VI. REMEDIAL MEASURES**

### **A. REVIEW, APPROVAL AND IMPLEMENTATION OF DELIVERABLES**

24. Each Deliverable is subject to review by EPA and the Cabinet. The scope of review varies depending on the nature of the Deliverable.

#### **25. Review Level 1 Deliverables.**

a. **Initial Submittal.** All Review Level 1 Deliverables shall be submitted to EPA and the Cabinet for review. After a reasonable period of consultation with the Cabinet, EPA may, in its discretion: (i) approve, in whole or in part, the Deliverable; (ii) approve the Deliverable upon specified conditions; (iii) disapprove, in whole or in part, the Deliverable, directing the City and WMU to modify the Deliverable; or (iv) any combination of the above.



b. **Obligation to Implement Review Level 1 Deliverable.** In the event EPA approves, approves upon conditions, or modifies any resubmission of a Deliverable pursuant to this Section, the City and WMU shall proceed to take any action required to implement the Deliverable, as approved or modified by EPA, subject only to the right to invoke Dispute Resolution pursuant to Section XIII (Dispute Resolution).

c. **Resubmission of Disapproved Review Level 1 Deliverable.**

(i). Upon receipt of a notice of disapproval pursuant to Paragraph 25(a)(iii) or (iv), the City and WMU shall, within 30 days, or such longer time as specified by EPA in such notice or agreed to in writing by EPA, revise the Deliverable as required by EPA and resubmit the Review Level 1 Deliverable to EPA for approval, subject only to the right to invoke Dispute Resolution pursuant to Section XIII (Dispute Resolution).

(ii). Any portion of a Deliverable that is not specifically disapproved by EPA in a notice of disapproval shall be considered approved and the City and WMU shall proceed to implement the approved portion of the Deliverable, provided that implementation of the approved portion of the Deliverable is not dependent upon implementation of the disapproved portion. Implementation of the approved portion of a Deliverable shall not relieve the City and WMU of liability for stipulated penalties under Section XI (Stipulated Penalties).

(iii). In the event that a resubmitted Review Level 1 Deliverable, or portion thereof, is again disapproved by EPA, after consultation with the Cabinet, EPA may again require the City and WMU to implement changes, in accordance with the preceding paragraphs. EPA, after consultation with the Cabinet, may also modify the resubmitted

Deliverable to cure the deficiencies, subject only to the right to invoke Dispute Resolution pursuant to Section XIII (Dispute Resolution).

d. **Review Level 1 Deliverables Are Enforceable.** Review Level 1 Deliverables, including all schedules set forth therein, shall be enforceable under this Consent Decree as if they were set forth herein upon approval, approval upon conditions, or modification by EPA, and after conclusion of any Dispute Resolution period. Any portion of a Review Level 1 Deliverable that is not specifically disputed by the City and WMU shall be enforceable during any Dispute Resolution period, provided that implementation of the non-disputed portions of the Deliverable is not dependent upon implementation of the disputed portion.

26. **Review Level 2 Deliverables.**

a. **Preparation and Implementation of Review Level 2 Deliverables.** The City and WMU shall develop, or review, evaluate and revise, as necessary to improve system performance, all Review Level 2 Deliverables by the specified deadline. The City and WMU shall notify EPA and the Cabinet that the development, or review, evaluation and revision has been completed; initiate or continue implementation of the associated Programs accordingly; and have the Programs and Program implementation documentation available for EPA and Cabinet on-site review.

b. **Obligation to Revise and Implement Review Level 2 Deliverable.** EPA and the Cabinet may inspect any Review Level 2 Deliverable pursuant to Section XVII (Right of Entry). The City and WMU shall revise a Review Level 2 Deliverable to address any EPA comment on any Review Level 2 Deliverable within 30 days of receipt of EPA's comment, or such longer time as agreed to in writing by EPA, subject only to

the right to invoke Dispute Resolution pursuant to Section XIII (Dispute Resolution). Thereafter, the City and WMU shall implement the actions required in the revised Review Level 2 Deliverable.

c. **Review Level 2 Deliverables Are Enforceable.** Review Level 2 Deliverables, including all schedules set forth therein, shall be enforceable under this Consent Decree as if they were set forth herein upon notice to EPA and Cabinet that the development, or review, evaluation and revision has been completed. Any portion of a Review Level 2 Deliverable that is not specifically disputed by the City and WMU shall be enforceable during any Dispute Resolution period, provided that implementation of the non-disputed portions of the Deliverable is not dependent upon implementation of the disputed portion.

27. **Revisions to Deliverables.** The Parties recognize that the City and WMU may need or want to revise certain Deliverables during the term of this Consent Decree. Such revisions shall not be considered modifications to the Consent Decree for purposes of Paragraph 71 (Modification). The City and WMU must obtain EPA's prior written approval of any revision to the substance of a Review Level 1 Deliverable. The City and WMU may revise the form of any Deliverable without consulting EPA, but shall provide a copy of any revised Review Level 1 Deliverable to EPA and Cabinet within 7 days after making such revision.

## **B. CMOM PROGRAMS**

28. The City and WMU shall develop the Capacity, Management, Operation and Maintenance ("CMOM") Programs under the schedule set forth below. The goal of the CMOM Programs shall be to eliminate all SSOs. All CMOM Programs shall be

developed in accordance with EPA Region IV guidance, as set forth in the attached CDROM disk (**Exhibit C**). The City and WMU shall ensure that each CMOM Program has a written, defined purpose; a written, defined goal; is documented in writing with specific detail; is implemented by trained personnel; has established performance measures; and has written procedures for periodic review. The City and WMU shall implement all CMOM Programs within two years of the date of entry of the Decree.

**a. Sewer System Inventory Program.** No later than two years from the Date of Entry, the City and WMU shall review, evaluate and revise, as necessary to improve system performance, its Sewer System Inventory Program, including a schedule of implementation. This Deliverable shall be subject to Review Level 2. The Program shall include an inventory of the collection and transmission system, cataloged by service area or Sewerbasin, that lists the system attributes and characteristics such as pipe age, pipe size, invert elevation, inverted siphons, pump stations with pump sizes, manholes, pipe material. The City and WMU shall develop and implement a standard management procedure for updating the inventory and shall develop and implement a standard management procedure for making the inventory available to WMU personnel.

**b. Acquisition Consideration Program.** No later than two years from the Date of Entry, the City and WMU shall review, evaluate and revise, as necessary to improve system performance, its Acquisition Consideration Program, including a schedule of implementation. This Deliverable shall be subject to Review Level 2. The Program shall establish procedures to be followed by the City and WMU during the acquisition of new or existing sewerage infrastructure from others. The Program shall provide for pre-acquisition inspection and evaluation of the infrastructure and a

determination of whether or not the infrastructure to be acquired meets standard design and construction criteria set by the City and WMU. Further, the Program shall provide for developing an estimate of the time and cost needed to bring the infrastructure to be acquired into compliance with design and construction standards.

c. **Continuous Sewer System Assessment Program (“CSSAP”).** No later than two years from the Date of Entry, the City and WMU shall develop and submit a CSSAP to analyze the infrastructure of the Sewer System. This Deliverable shall be subject to Review Level 1. The CSSAP shall establish procedures for setting sewer-basin priorities and schedules for undertaking the assessment components set forth in subparagraphs (i) through (v) below. The CSSAP shall develop these priorities and schedules taking into consideration the nature and extent of any customer complaints; flow monitoring, including flow isolation studies; location and cause of SSOs, including those identified pursuant to the SSOP; pump station run times; field crew work orders; any preliminary sewer assessments, such as midnight flow monitoring; and any other relevant information. The CSSAP shall include standard procedures for a CSSAP information management system and performance goals for each component of the CSSAP set forth in paragraphs (i) through (v) below. Upon approval, WMU and the City shall implement the CSSAP and such assessment components in accordance with the schedules established pursuant to the CSSAP.

(i) . **Sewer System Assessment Priority Program.** The City and WMU shall have in place a Sewer System Assessment Priority Program, including a schedule of implementation, for establishing Sewerbasin priorities for undertaking sewer system assessment activities. The program shall develop priorities based upon information such

as location and nature of customer complaints, flow monitoring (including flow isolation studies), location of sanitary sewer overflows, pump station run times, field crew work orders, and other available information.

**(ii). Corrosion Defect Identification.** The Corrosion Defect Identification component of the CSSAP shall establish standard procedures for inspecting and identifying sewer infrastructure that is either corroded or at risk of corrosion. The Corrosion Defect Identification component shall include a system for prioritizing repair of corrosion defects, corrosion identification forms, and procedures for a corrosion defect analysis.

**(iii). Routine Manhole Inspection.** The Routine Manhole Inspection component of the CSSAP shall establish standard procedures for routine inspection of all manholes within the sewer system. The Routine Manhole Inspection component shall include manhole inspection forms and procedures for a manhole defect analysis.

**(iv). Flow Monitoring.** The Flow Monitoring component of the CSSAP shall establish standard procedures for routine flow monitoring during dry and wet weather to support engineering analyses related to sewer system capacity and peak flow studies. Dry weather monitoring shall be carried out so as to allow the characterization of base flows and inflow and infiltration rates. Wet weather monitoring shall be conducted periodically during events of sufficient duration and intensity that cause significant inflow and infiltration into the Sewer System. The Flow Monitoring component will identify areas susceptible to inflow and infiltration into the Sewer System. The Flow Monitoring Program shall establish a process for determining the number and locations of

permanent, if necessary, and temporary flow meters; a program for sewer cleaning associated with flow monitoring; and a procedure for adequate rainfall measurement.

(v). **Pump Station Performance and Adequacy.** The Pump Station Performance and Adequacy component of the CSSAP shall establish standard procedures for the evaluation of pump station performance and pump station adequacy. The Pump Station Performance and Adequacy component may include items such as the use of pump run time meters; pump start cycles; computation of Nominal Average Pump Operating Time ("NAPOT"); root cause failure analysis protocols; and appropriate remote sensing such as Supervisory Control and Data Acquisition ("SCADA").

d. **Infrastructure Rehabilitation Program ("IRP").** No later than two years from the Date of Entry, WMU and the City shall submit an IRP. This Deliverable shall be subject to Review Level 1. The IRP shall employ the components identified in subparagraphs (i) through (iv) below to, among other things, address inflow and infiltration and the other conditions causing SSOs, with the goal of eliminating SSOs. The IRP shall take into account all information gathered pursuant to the SSOP Update and the CSSAP. The IRP shall include standard procedures for an IRP information management system and procedures for analysis of the effectiveness of completed rehabilitation for each component of the IRP set forth in subparagraphs (i) through (iv) below. Upon approval, WMU and the City shall implement the IRP and its components in accordance with the schedules established pursuant to the IRP to rehabilitate the infrastructure of the Sewer System.

(i) **Gravity Line Rehabilitation.** The Gravity Line Rehabilitation component of the IRP shall require rehabilitation of all gravity sewer lines and related

appurtenances that have been identified as in need of rehabilitation under the CSSAP.

The Gravity Line Rehabilitation component shall establish a process for setting gravity line rehabilitation priorities and schedules; shall establish an ongoing inventory of gravity line rehabilitation, including identification of the rehabilitation techniques used; shall require an analysis of the effectiveness of completed rehabilitation; and shall identify currently scheduled gravity line rehabilitation.

(ii) **Manhole Rehabilitation.** The Manhole Rehabilitation component of the IRP shall require rehabilitation of all manholes that have been identified as in need of rehabilitation under the CSSAP. The Manhole Rehabilitation component shall establish a process for setting manhole rehabilitation priorities and schedules; shall establish an ongoing inventory of manhole rehabilitation, including identification of the rehabilitation techniques used; and shall identify currently scheduled manhole rehabilitation.

(iii) **Pump Station Rehabilitation.** The Pump Station Rehabilitation component of the IRP shall require rehabilitation of all pump stations that have been identified as in need of rehabilitation under the CSSAP. The Pump Station Rehabilitation component shall establish a process for setting pump station rehabilitation priorities and schedules; shall establish an ongoing inventory of pump station rehabilitation, including identification of the rehabilitation techniques used; and shall identify currently scheduled pump station rehabilitation.

(iv) **Force Main Rehabilitation.** The Force Main Rehabilitation component of the IRP shall require rehabilitation of all force mains and related appurtenances that have been identified as in need of rehabilitation under the CSSAP. The Force Main Rehabilitation component shall establish a process for setting force main rehabilitation



priorities and schedules; shall establish an ongoing inventory of force main rehabilitation, including identification of the rehabilitation techniques used; and shall identify currently scheduled force main rehabilitation.

**e. System Capacity Assurance Program (“CAP”).**

(i) **The Program.** No later than two years from the Date of Entry, the City and WMU shall submit a CAP. This Deliverable shall be subject to Review Level 1. The CAP shall identify each sewer-basin or part of a sewer-basin with insufficient capacity under either peak wet weather, or average conditions, or both. It shall also analyze all portions of the Sewer System that hydraulically impact all known SSOs. The CAP shall assess peak flow capacity of all Major System Components for existing and proposed flows. The CAP shall enable WMU and the City to authorize new sewer service connections, or increases in flow from existing sewer service connections, only after WMU and the City certify that the analysis procedures contained in the approved CAP have been used and that WMU and the City have determined, based on those procedures, that there is Adequate Treatment Capacity, Adequate Transmission Capacity and Adequate Collection Capacity as set forth in Paragraph 28(f)(ii) through (viii) below. At a minimum, the CAP shall contain all of the following components:

(A) the technical information, methodology and analytical techniques, including the model or software, to be used by WMU and the City to calculate collection, transmission and treatment capacity;

(B) the means by which WMU and the City will integrate its certification of Adequate Treatment Capacity, Adequate Transmission Capacity and Adequate Collection

Capacity with WMU's approval of the application for extension of water and sewer lines, and acquisition of new or existing sewers from other owners;

(C) the technical information, methodology and analytical techniques, including the model or software, to be used to calculate the net (cumulative) increase or decrease in volume of wastewater introduced to the Sewer System as a result of authorization of new sewer service connections and increases in flow from existing connections and the completion of: (a) specific projects that add or restore capacity to the Sewer System ("Capacity Enhancing Projects"), (b) specific projects that reduce peak flow through removal of inflow and infiltration ("I/I Projects"), and (c) permanent removal of sewer connections ("Removal of Connections");

(D) an information management system capable of tracking the accumulation of banked credits, earned pursuant to Paragraph 28(f)(vi) below, from completion of Capacity Enhancing Projects, I/I Projects and Removal of Connections, the capacity-limited portion of the sewer-basin in which those credits were earned, and the expenditure of such credits on future increases in flow from new and existing sewer service connections in that capacity-limited portion of the sewer-basin; and

(E) all evaluation protocols to be used to calculate collection, transmission and treatment capacity including, but not limited to, standard design flow rate rules of thumb regarding pipe roughness, manhole head losses, as-built drawing accuracy (distance and slope), and water use (gallons per capita per day); projected flow impact calculation techniques; and metering of related existing peak flows (flows metered in support of analysis and/or manual observation of existing peak flows).

(ii) **Capacity Certifications.** Except as provided in Paragraphs 28(f)(iv) and (vi) below, effective July 31, 2011, WMU and the City may authorize a new sewer service connection, or additional flow from an existing sewer service connection, only after they certify that the analysis procedures contained in the approved CAP have been used and that the City and WMU have determined, based on those procedures, that there is Adequate Treatment Capacity, Adequate Transmission Capacity and Adequate Collection Capacity as set forth in subparagraphs (A) through (C) below.

(A) **Treatment Capacity Certifications.** The City and WMU shall provide certification of "Adequate Treatment Capacity," and shall confirm that, at the time the WWTP receives the flow from a proposed sewer service connection(s) or increased flow from an existing sewer service connection(s), when combined with the flow predicted to occur from all other authorized sewer service connections (including those which have not begun to discharge into the Sewer System), the WWTP will not be in "non-compliance" for quarterly reporting as defined in 40 C.F.R. Part 123.45, Appendix A.

(B) **Transmission Capacity Certifications.** Certification of "Adequate Transmission Capacity" shall confirm that each pump station, through which the proposed additional flow from new or existing sewer service connections would pass to the WWTP receiving such flow, has the capacity to transmit, with its largest pump out of service, the existing one (1) hour peak flow passing through the pump station, plus the addition to the existing one (1) hour peak flow predicted to occur from the proposed connection, plus the addition to the existing one (1) hour peak flow predicted to occur from all other authorized sewer service connections which have not begun to discharge into the Sewer System.

(C) **Collection Capacity Certifications.** Certification of “Adequate Collection Capacity” shall confirm that each gravity sewer line, through which the proposed additional flow from new or existing connections would pass, has the capacity to carry the existing one (1) hour peak flow passing through the gravity sewer line, plus the addition to the existing one (1) hour peak flow from the proposed connection, plus the addition to the existing one (1) hour peak flow predicted to occur from all other authorized sewer service connections which have not begun to discharge into the Sewer System without causing a Surge Condition.

(D) **Definition of “One (1) Hour Peak Flow” and “Surge Condition”.** For purposes of this Paragraph 28(f) only, the term “one (1) hour peak flow” shall mean the greatest flow in a sewer averaged over a sixty (60) minute period at a specific location expected to occur as a result of a representative 2 year-24 hour storm event. For purposes of this Paragraph 28(f) only, the term “Surge Condition” shall mean the condition that exists when the supply of wastewater resulting from the one (1) hour peak flow is greater than the capacity of the pipes to carry it and the surface of the wastewater in manholes rises to an elevation greater than twenty-four (24) inches above the top of the pipe or within three (3) feet of the rim of the manhole, and the sewer is under pressure or head, rather than at atmospheric pressure.

(iii) **Minor Sewer Connections.** For Minor Sewer Connections, the City and WMU may elect to perform a Monthly capacity analysis for each sewer-basin or part of a sewer-basin by certifying that the sewer-basin has adequate capacity, as defined in Paragraph 28(f)(ii)(A) through (C) above, to carry existing peak flows and the additional flows generated by all such Minor Sewer Connections projected to be approved in the

subsequent Month. For any Sewerbasin or part of a Sewerbasin which can be so certified, the City and WMU may approve these projected Minor Sewer Connections without performing individual certifications for each connection.

(iv) **Essential Services.** Notwithstanding the provisions of Paragraph 28(f)(ii)(B) and (C) above, and subject to EPA approval, the City and WMU may authorize a new sewer service connection or additional flow from an existing sewer service connection, even if it can not certify that it has Adequate Transmission Capacity, Adequate Collection Capacity and/or Adequate Treatment Capacity for health care facilities, public safety facilities and public schools and government facilities; and in those cases where a pollution or sanitary nuisance condition exists, as determined by the Clark County Health Department or the Commonwealth, or their regulatory successors. For all such new service connections, or additions to flow from an existing connection, the City and WMU shall make the appropriate subtraction to the balance in the credit bank described in Paragraph 28(f)(vi)(I) below and modify the list described in Paragraph 28(f)(vii) below.

(v) **Certifications.** All certifications pursuant to this Paragraph 28(f) shall be made by a professional engineer registered in the Commonwealth of Kentucky and shall be approved by a responsible party of the City and WMU as defined by 40 C.F.R. § 122.22(b). The City and WMU shall maintain all such certifications, and all data on which the certifications are based, in its offices for inspection by EPA and Cabinet. EPA and Cabinet may request, and the City and WMU shall provide, any and all documentation necessary to support any certification made pursuant to this Paragraph

28(f), and make available, to the extent possible, individuals providing such certifications to meet with EPA and Cabinet.

(vi) **Capacity for Treatment, Transmission and Collection in Lieu of Certification.** The City and WMU may authorize a new sewer service connection, or additional flow from an existing sewer service connection, even if they cannot satisfy the requirements of Paragraph 28(f)(ii), provided that they certify that all of the following provisions, where applicable, are satisfied:

(A) The City and WMU are in substantial compliance with this Consent Decree;

(B) The City and WMU have identified the sewer line segment(s), pump station(s), and/or treatment system(s) that do not meet the conditions for certification of Adequate Treatment Capacity, Adequate Collection Capacity and/or Adequate Transmission Capacity;

(C) The City and WMU have identified the sewer line segment(s) from which there has been an SSO;

(D) The City and WMU shall complete, prior to the time the proposed additional flow from new or existing sewer service connections is introduced into the Sewer System, specific Capacity Enhancing Projects, I/I Projects and/or Removal of Connections which will add sewer capacity or reduce peak flows to the identified sewer line segment(s), pump station(s), or treatment system(s) in accordance with the factors set forth in subparagraphs (E) and (F) below;

(E) Where the City and WMU have undertaken specific Capacity Enhancing Projects that provide for additional off-line storage and/or specific Removal of

Connections to satisfy the requirements of subparagraph (D) above, the estimated added capacity resulting from such projects must be equal to or greater than the estimated amount of any proposed additional flow.

(F) Where the City and WMU have undertaken specific I/I Projects or Capacity Enhancing Projects, other than those that provide for additional off-line storage, to satisfy the requirements of subparagraph (D) above, the estimated reduction in peak flows or added capacity resulting from such projects must exceed the estimated amount of any proposed additional flow by the following factors: (a) a factor of 3:1 for I/I Projects and such other Capacity Enhancing Projects related to an SSO; and (b) a factor of 2:1 for I/I Projects and such other Capacity Enhancing Projects not related to an SSO;

(G) Commencing January 31, 2012, and annually thereafter, the City and WMU have performed a review of specific Capacity Enhancing Projects and I/I Projects undertaken to determine if actual added capacity and peak flow reductions are in line with what the City and WMU originally estimated for such projects; and the City and WMU have used the results of this review to adjust future estimates as necessary;

(H) Any new sewer service connection or increase in flow to an existing connection authorized prior to the completion of a necessary added capacity or peak flow reduction project as set forth above shall be conditioned upon completion of such project prior to the time that the new sewer service connection or flow increase is introduced into the Sewer System; and

(I) In implementing the provisions of this Paragraph 28(f)(vi), the City and WMU may use a “banking credit system” for the sewer line segment(s), pump station(s), or wastewater treatment systems for which the City and WMU are not able to satisfy the

conditions set forth in Paragraph 28(f)(ii) above. The addition of sewer capacity and/or reduction in peak flows from Capacity Enhancement Projects, I/I Projects and Removal of Connections, completed after April 7, 2006, to the affected sewer line segment, pump station, or wastewater treatment system may be accumulated in the form of credits in accordance with the factors set forth in subparagraphs (E) and (F) above, which may then be used for authorization of future sewer service connections or increases in flow from existing connections to the affected sewer line segment, pump station, or wastewater treatment system in the capacity-limited portion of the sewer-basin.

(vii) Within 60 days of the date of entry of this Decree, the City and WMU shall establish a list of all authorized new sewer service connections or increases in flow from existing connections which flows have not yet been introduced into the Sewer System. The following information shall be recorded for each authorized connection: street address, estimated average daily flow, estimated peak flow, Sewerbasin, date authorized, and estimated Calendar Quarter when the additional flow from the connection will begin. The City and WMU shall update and maintain this list as necessary until full implementation of the CAP, as approved by EPA.

(viii) Nothing contained in this Paragraph 28(f) shall alter the Cabinet's regulations pertaining to sewer line extensions and the City and WMU shall at all times comply with the regulations and any requirements of the Cabinet. Plans for sanitary sewer line extensions shall be submitted to the Cabinet and reviewed by the Cabinet in accordance with 401 KAR 5:005. With each request submitted for a sanitary sewer line extension, WMU shall submit to the Cabinet the analysis performed pursuant to



Paragraph 28(f)(ii) of the Consent Decree demonstrating that capacity exists for the proposed extension.

**g. Financial and Cost Analysis Programs.** No later than six months after approval of all Review Level 1 CMOM programs or the SSOP Update, whichever is later, the City and WMU shall review, evaluate and revise, as necessary to improve system performance, its Financing and Cost Analysis Program for sewers and wastewater treatment, including a schedule of implementation, as described in each of the subparagraphs within this paragraph. This Deliverable is subject to Review Level 1.

**(i) Capital Improvement Program Funding.** The City and WMU shall have in place a program, including a schedule of implementation, to analyze, project, plan and finance its sewer system and wastewater treatment capital improvement needs established through proper engineering study and analysis as described in Paragraphs 28(c) and (d), above. Capital improvement financing shall be planned using, at a minimum, a 5-year planning horizon followed by annual updates.

**(ii) Budget and Customer Rate Setting Analysis.** The City and WMU shall have in place a program, including a schedule of implementation, to establish its annual budget and set customer rates that assures that the budget and rates are based on the programs referenced in Sections VI(B) and (C) of this Consent Decree.

**h. Public Education Program.** No later than one year after the Date of Entry, the City and WMU develop a Public Education Program, including a schedule of implementation. This Deliverable is subject to Review Level 2. The Program shall provide for educating the public and getting public support regarding issues such as

service lateral maintenance, grease management, food disposals, and the need for infrastructure rehabilitation.

i. **Inter-Jurisdictional Agreement Program.** No later than one year after the Date of Entry, the City and WMU shall develop an Inter-Jurisdictional Agreement Program, including a schedule of implementation, and have the legal support necessary to develop, negotiate and enforce inter-jurisdictional agreements. This Deliverable is subject to Review Level 1. The Program shall provide for establishing management, operation and maintenance agreement mechanisms with satellite sewer systems and major volume sewer customers. The Program shall provide for addressing flow-based issues, management, operation and maintenance provisions, the life of the agreements, enforcement of the agreements' provisions and mechanisms for modifying the agreements.

j. **Spill Impact Water Quality Monitoring Program.** No later than one year after the Date of Entry, the City and WMU shall develop and implement a Spill Impact Water Quality Monitoring Program to assess any impact upon public health and the environment of pollution resulting from any Unpermitted Discharges, and to assist in assessing the need for any environmental and/or public health response. This Deliverable is subject to Review Level 2. This Program shall at all times be in compliance with KRS Chapter 224 and 401 KAR Chapter 5.

(i). **Protocols.** The Program shall include protocols for mapping all actual sampling locations, for determining the frequency and duration of sampling (depending upon the potential impact of the spill on public health and the environment), and for sampling for pH, water temperature, dissolved oxygen, and fecal coliform or E. coli

bacteria. The sampling protocol shall include sampling upstream (control) and downstream of the spill. The sampling protocol also shall identify the circumstances under which the City and WMU shall sample for those Priority Pollutants known to be present in the wastewater of any Significant Industrial User that discharges into the portion of the Sewer System upsewer of the Unpermitted Discharge.

(ii). **Information Management System.** The Program shall include an information management system, which shall contain a list of the Priority Pollutants, if any, in wastewater discharged by any Significant Industrial User to the Sewer System, and the lines affected by any such discharge.

(iii). **Quality Assurance, Sampling, Data Analysis.** The City and WMU shall use analytical procedures, sample containers, preservation techniques, and sample holding times that are specified in 40 C.F.R. Part 136. Upon request, the City and WMU shall allow split or duplicate samples to be taken by EPA, Cabinet, or their authorized representatives. In addition, EPA and Cabinet shall have the right to take any additional samples that EPA or Cabinet may deem necessary.

(iv). **Water Quality Reporting.** The City and WMU shall report, pursuant to the requirements of Section VII (Reporting Requirements), the following information: (a) the actions which have been taken under this Section during the previous Calendar Quarter, including the dates and times of all sampling; (b) a summary of all results of sampling during the previous Calendar Quarter; and (c) all actions including, but not limited to, data collection, which are scheduled for the next Calendar Quarter.

k. **Corrosion Control Program.** No later than one year after the Date of Entry, the City and WMU shall review, evaluate and revise, as necessary to improve

system performance, its Corrosion Control Program, including a schedule of implementation. This Deliverable is subject to Review Level 2. The Program shall include provisions for inspecting the sewerage infrastructure for corrosion caused by hydrogen sulfide or other corrosives, the development and implementation of site specific corrosion control measures, application of corrosion control measures where needed, a monitoring program to evaluate corrosion control programs and performance measures and a corrosion control program information management system.

**I. Fats, Oils, and Grease Control Program (“FOG Program”).** No later than two years after the Date of Entry, the City and WMU shall develop the FOG Program described in each of the sub-paragraphs within this paragraph. This Deliverable is subject to Review Level 2. The Program shall include:

(i). legal authority to control the discharge of grease into the Sewer System, including an assessment of the feasibility of instituting a permit program;

(ii). specification of accepted devices to control the discharge of grease into the Sewer System;

(iii). establishment of standards for the design and construction of grease control devices including standards for capacity and accessibility, site map, design documents and as-built drawings;

(iv). establishment of grease control device management, operation and maintenance standards, or best management practices, that address on-site record keeping requirements, cleaning frequency, cleaning standards, use of additives, and ultimate disposal;

(v). establishment of construction inspection protocols, including scheduling, inspection report forms, and inspection record keeping requirements, to assure that grease control devices are constructed in accordance with established design and construction standards;

(vi).. establishment of compliance inspection protocols, including scheduling, inspection report forms, and inspection record keeping requirements to assure that grease control devices are being managed, operated and maintained in accordance with the established management, operation and maintenance standards or best management practices;

(vii). establishment of an enforcement program to ensure compliance with the grease control program;

(viii). establishment of a compliance assistance program to facilitate training of grease generators and their employees;

(ix). establishment of a public education program directed at reducing the amount of grease entering the Sewer System from private residences;

(x). establishment of staffing and equipment requirements to ensure effective implementation of the program; and,

(xi). establishment of performance indicators to be used by the City and WMU to measure the effectiveness of the FOG Program.

**m. Routine Hydraulic Cleaning Program.** No later than one year after the Date of Entry, the City and WMU shall develop a Routine Hydraulic Cleaning Program for gravity lines, including a schedule of implementation. This Deliverable is subject to Review Level 2. The Program will establish needs determination, priorities and

scheduling, number of crews and personnel, hydraulic cleaning equipment to be used, standard hydraulic cleaning maintenance procedures, standard forms, records and performance measures and an information management system.

**n. Root Control Program.** No later than one year after the Date of Entry, the City and WMU shall develop a Root Control Program for gravity lines, including a schedule of implementation. This Deliverable is subject to Review Level 2. The Program shall establish needs determination, priorities and scheduling, number of crews and personnel, root control equipment and chemicals, if any, to be used, standard root control maintenance procedures, standard forms, records and performance measures and an information management system.

**o. Sewer Overflow Response Plan.** No later than six months after the Date of Entry, WMU and the City shall submit a Sewer Overflow Response Plan (“SORP”) in compliance with 401 KAR 5:015 to establish the timely and effective methods and means of: (1) responding to, cleaning up, and/or minimizing the impact of all SSOs; (2) reporting the location, volume, cause and impact of all SSOs to the Cabinet and EPA; and (3) notifying the potentially impacted public. The SORP shall include a proposed protocol for determining when an SSO begins and ends, and whether repeated discharges from a single point source over a specific period of time will be considered a single SSO event for purposes of assessing stipulated penalties under this Consent Decree. This Deliverable is subject to Review Level 1. By the anniversary date of EPA approval of the SORP, WMU and the City shall annually review the SORP and propose changes as appropriate. Such proposals are Deliverables subject to Review Level 1. A copy of

future updates to the SORP shall also be provided to the Frankfort Regional Office of the Cabinet's Division of Water within 15 days of incorporation of the update.

### **C. COMPLIANCE PROGRAMS AND SCHEDULES**

29. **Capital Projects.** WMU and the City shall expand the treatment capacity for the WWTP pursuant to the 201 Facilities Plan Update, Strodes Creek WWTP for Winchester Municipal Utilities, Winchester, Kentucky, dated April 1995, and approved by the Cabinet on February 6, 1997, to achieve compliance with 401 KAR Chapter 5 and the KPDES Permit no later than January 1, 2008.

30. **Update to Sanitary Sewer Overflow Plan.** No later than six months from the Date of Entry, WMU and the City shall submit an updated Sanitary Sewer Overflow Plan ("SSOP Update") to identify remedial measures to eliminate all SSOs at locations identified in **Exhibit A**. This Deliverable is subject to Review Level 1. EPA will coordinate its review of the SSOP Update with the Cabinet as WMU may separately submit the SSOP Update to the Cabinet for approval for purposes of compliance with 401 KAR 5:005, Section 8. The SSOP Update shall include expeditious schedules for analyzing, designing, initiating construction, and completing construction of remedial measures to eliminate all SSOs at locations identified in **Exhibit A**; provided, however, that such schedules shall not extend beyond July 31, 2011, for the constructed discharge points located at Snowfall and Stoneybrook; July 31, 2012 for the constructed discharge points located at Maryland Avenue and Smith Manor; July 31, 2013 for the constructed discharge point located at Bel-Air; and January 31, 2021, for the Madison Avenue, Flanagan Street and East Washington SSO locations. For the other locations identified in

**Exhibit A**, the schedules shall not extend beyond January 31, 2025. The SSOP Update shall include, at a minimum, the following elements:

(A) A map that shows the location of all known SSOs. The map shall include the areas and sewer lines that serve as tributary to each SSO. Smaller maps of individual tributary areas may also be included to show the lines involved in more detail.

(B) A description of each SSO that includes:

- (i) The frequency of the SSO;
- (ii) The estimated annual volume of the SSO;
- (iii) A description of the location of the SSO, e.g., manhole, pump station, etc.;
- (iv) The receiving stream;
- (v) The immediate area and downstream land use, including the potential for public health concerns;
- (vi) A description of any previous (within the last 5 years), current, or proposed studies to investigate the event; and
- (vii) A description of any previous (within the last 5 years), current, or proposed rehabilitation or construction work to remediate or eliminate the SSO.

(C) A prioritization of the SSOs identified in **Exhibit A**, based primarily on the frequency, volume and impact on the receiving stream and upon public health, and in coordination with any remedial activity performed pursuant to the CMOM programs. Based upon this prioritization, WMU and the City shall develop remedial measures and expeditious schedules for design, initiation of construction and completion of



construction to eliminate these SSOs. Such schedules shall be phased based on sound engineering judgment and in no case shall extend beyond the deadlines established in this Paragraph 30.

## **VII. REPORTING REQUIREMENTS**

31. **Quarterly Reports.** The City and WMU shall submit to the EPA and the Cabinet a quarterly report that describes the progress of the City and WMU in complying with this Consent Decree for the previous quarter no later than thirty days after the end of each calendar quarter. The first such report shall be submitted to the EPA and the Cabinet no later than thirty days after the second full quarter after entry of this Consent Decree. The quarterly report shall include, at a minimum:

- (a) A description of projects and activities conducted during the previous quarter to comply with the requirements of this Consent Decree, in Gantt chart or similar format;
- (b) The date, location, estimated volume, and cause of all SSOs for the current quarter; the date, estimated volume, and cause of Unauthorized Bypasses at the wastewater treatment plant for the current quarter; a cumulative accounting of the reduction in volume and in number of occurrences of SSOs and Unpermitted Bypasses;
- (c) The anticipated projects and activities that will be performed in the successive quarter to comply with the requirements of this Consent Decree, in Gantt chart or similar format; and

(d) Any additional information necessary to demonstrate that the City and WMU are adequately implementing the remedial measures set forth in Section VI above.

32. **Annual Reports.** The City and WMU shall submit to EPA and the Cabinet an annual report for the previous calendar year, with the first report due January 31, 2008, and each year thereafter by January 31. Each annual report shall contain a summary of the CMOM Programs implemented pursuant to this Consent Decree, including a comparison of actual performance with any performance measures that have been established, and a summary of each of the capital projects implemented pursuant to this Consent Decree.

33. Unless waived by the parties in writing, the parties shall convene each February and August during the term of the Decree, either in person or by phone, to discuss issues pertaining to the performance of the Decree by WMU and the City.

#### **VIII. REVIEW OF SUBMITTALS**

34. EPA agrees to expeditiously review and comment on submittals that the City and WMU are required to submit for approval pursuant to the terms and provisions of this Consent Decree. If EPA cannot complete their review of a submittal within 90 days of receipt of the submittal, EPA shall so notify the City and WMU before the expiration of the 90-day review period. If EPA fails to approve, provide comments or otherwise act on a submittal within ninety days of receipt of the submittal, any subsequent milestone date set forth in the submittal that is dependent upon such action by EPA shall be extended by the number of days beyond the 90-day review period that is used by EPA for approval of the submittal.

35. Upon review of submittals that the City and WMU are required to submit to EPA and the Cabinet pursuant to the terms and provisions of this Consent Decree, EPA may: (1) approve the submittal in writing, in whole or in part, or (2) in the event the submittal is not approved in whole, provide written comments to the City and WMU identifying any deficiencies. Upon receipt of any comments identifying deficiencies, the City and WMU shall have 60 days to revise and resubmit the submittal to EPA and the Cabinet for review and approval, subject to the rights of the City and WMU under the dispute resolution provisions of this Consent Decree. Upon resubmission, EPA and the Cabinet shall jointly review, and EPA shall approve or disapprove, the revised submittal. If the resubmission is disapproved, EPA may require further revisions to the submittal by the City and WMU, subject to the rights of the City and WMU under the dispute resolution provisions of this Consent Decree, or may deem the City and WMU to be out of compliance with this Consent Decree for failure to timely submit the submittal in compliance with the requirements of this Consent Decree, and may assess stipulated penalties pursuant to this Consent Decree, subject only to the rights of the City and WMU under the dispute resolution provisions of this Consent Decree. Upon EPA approval of all or any part of a submittal set forth in Section VI of this Consent Decree, any such submittal, or any approved part thereof (provided that the approved part is not dependent upon implementation of any part not yet approved), shall be incorporated into this Consent Decree and become an enforceable requirement of this Consent Decree.

#### **IX. CIVIL PENALTY**

36. The City and WMU shall pay a civil penalty in the amount of \$75,000.00 to the United States in two installments. The first installment of \$40,000.00 shall be due

within 30 days of the Date of Entry. The second installment of \$35,000.00 shall be due no later than September 30, 2008.

**X. SUPPLEMENTAL ENVIRONMENTAL PROJECT**

37. The City and WMU shall timely perform the supplemental environmental project ("SEP") set forth in Exhibit D, which has the objective of securing significant environmental or public health protection and improvements. The total expenditure for the SEP shall not be less than \$230,000.00. If the City and WMU fail to perform the SEP by the dates specified in Exhibit D, the City and WMU shall pay the difference between its documented SEP expenditures and \$230,000.00 to the United States as a stipulated penalty. Such payment shall be due and payable on the date for completion of the SEP identified in Exhibit D. Alternatively, the City and WMU may propose, and the United States shall consider, additional SEPs for which the total expenditure shall not be less than the difference between its documented SEP expenditures and \$230,000.00.

38. The City and WMU shall submit to the EPA and the Cabinet a SEP Completion Report for the SEP described in Exhibit D no later than 60 days from the date for completion of the SEP set forth in Exhibit D. The Report shall contain the following information for the SEP: i) a detailed description of the SEP as implemented; ii) a description of any operating problems encountered and the solutions thereto; iii) itemized costs; iv) certification that the SEP has been fully implemented pursuant to Exhibit D and the provisions of this Consent Decree; and v) a description of the environmental and public health benefits resulting from implementation of the SEP.

## **XI. STIPULATED PENALTIES**

39. For failure to timely submit any of the submittals prescribed in Section VI of this Consent Decree, EPA may assess against the City and WMU a stipulated penalty in the amount of \$1,000. For each day the City and WMU remain out of compliance for failure to timely submit any of the above submittals, EPA may assess against the City and WMU a stipulated penalty of an additional \$100 per day. This penalty is in addition to, and not in lieu of, any other penalty that could be assessed.

40. For each day the City and WMU fail to timely complete projects in accordance with the schedule set forth in an approved compliance program, EPA may assess against the City and WMU stipulated penalties for each such project as follows:

Period Beyond Completion Date	Penalty Per Violation Per Day
1 - 30 days	\$500
31 - 60 days	\$1,000
61 - 120 days	\$1,500
more than 120 days	\$2,000

This penalty is in addition to, and not in lieu of, any other penalty that could be assessed.

41. For failure to timely submit a Quarterly Report or an Annual Report, or a complete Annual Report or Quarterly Report, EPA may assess against the City and WMU a stipulated penalty as follows:

Period Beyond Completion Date	Penalty Per Violation Per Day
1 - 30 days	\$250
31 - 60 days	\$500
61 - 120 days	\$750
more than 120 days	\$1,000

This penalty is in addition to, and not in lieu of, any other penalty that could be assessed.

42. For the circumstances described below, the EPA may assess against the City and WMU stipulated penalties as follows:

(a) For an SSO that occurs at a location identified on **Exhibit A**, \$1,000 per SSO occurring after the deadline specified for that location in the SSOP Update submitted pursuant to Paragraph 30.

(b) For an SSO experienced at any location other than those identified on **Exhibit A**, for which no project has been identified to eliminate the location in the SSOP Update, \$500 per SSO occurring more than three years after the date of entry of this Consent Decree.

(c) For Unpermitted Bypasses at the WWTP, \$2,000 per Unpermitted Bypass occurring after January 1, 2008.

These penalties are in addition to, and not in lieu of, any other penalty that could be assessed.

43. If EPA determines to assess and demand a stipulated penalty, EPA shall send the City and WMU written notice, including the amount of the stipulated penalty

due. The City and WMU shall pay the stipulated penalty within 60 days of receipt of the notice.

44. If the City and WMU believe the request for payment of a stipulated penalty is erroneous or contrary to law, it may invoke the dispute resolution provisions of this Consent Decree. Invoking the dispute resolution provisions does not automatically excuse timely payment of the penalty or the continuing accrual of stipulated penalties, unless agreed to by EPA or stayed by the Court. If the City and WMU invoke the dispute resolution provisions of this Consent Decree under these circumstances, the City and WMU shall deposit the amount of the stipulated penalty into an escrow account bearing interest on commercially reasonable terms, in a federally-chartered bank. Upon final resolution of the dispute by the EPA, or the Court, the City and WMU shall, within 5 days thereof, serve written instructions directing that the escrow agent, within 15 days thereof, cause the monies in the escrow account to be paid to the United States in accordance with the procedures set forth in Paragraph 45 below, or returned to the City and WMU, depending on the outcome of the dispute resolution process. The failure to make timely payment of stipulated penalties, either to the United States or to an escrow account pursuant to this Paragraph, shall constitute an additional violation of this Consent Decree.

## **XII. PAYMENT OF PENALTIES AND STIPULATED PENALTIES**

45. Payment of all sums due to United States shall be made by electronic funds transfer, in accordance with written instructions to be provided by the United States after entry of this Consent Decree. The costs of such electronic funds transfer shall be the responsibility of the City and WMU. The City and WMU shall send a copy of the

electronic funds transfer authorization form, the electronic funds transfer transaction record, and the transmittal letter to the Parties as specified in Paragraph 64 below. The transmittal letter shall reference the case name and DOJ Case No. 90-5-1-1-08806.

46. In the event that full payment of a penalty is not made when due, the City and WMU shall pay interest on the balance due from the original due date to the date of payment, at the rate calculated pursuant to 28 U.S.C. § 1961.

### **XIII. DISPUTE RESOLUTION**

47. Any dispute that arises under or with respect to this Consent Decree shall in the first instance be the subject of informal negotiations between the Parties. The City and WMU shall invoke the informal dispute resolution procedures by notifying EPA and the Cabinet in writing of the matters(s) in dispute and of their intention to resolve the dispute under this Section XIII. The notice shall: (1) outline the nature and basis of the dispute; (2) include a proposed resolution; (3) include all information or data relating to the dispute and the proposed resolution; and (4) request negotiations pursuant to this Paragraph to informally resolve the dispute. The Parties shall then attempt to resolve the dispute informally for a period of 30 days from the date of the notice with the goal of resolving the dispute in good faith, without further proceedings. The period for informal negotiations shall not exceed 30 days from the date of the original notice of this dispute, unless the Parties otherwise agree in writing to extend that period.

48. If informal negotiations are unsuccessful, the position of EPA shall control unless, within 30 days after the conclusion of the informal negotiation period, the City and WMU seek judicial review of the dispute by filing with the Court and serving on EPA and the Cabinet a motion requesting judicial resolution of the dispute. The motion



shall contain a written statement of the position of the City and WMU on the matter in dispute, including any supporting factual data, analysis, opinion, or documentation, and shall set forth the relief requested and any schedule within which the dispute must be resolved for orderly implementation of the Consent Decree. EPA shall respond to the motion within 30 days. The City and WMU may request an evidentiary hearing for good cause. The burden of proof is on the City and WMU to demonstrate that their position on the matter in dispute meets the objectives of the Consent Decree, any amendment to this Consent Decree, the CWA and KRS Chapter 224. If the dispute is not resolved within the schedule identified for orderly implementation of the Consent Decree in the motion, the City and WMU may request additional time beyond compliance schedules or deadlines in this Consent Decree that are dependent upon the duration and/or resolution of the dispute.

#### **XIV. FORCE MAJEURE**

49. The City and WMU shall perform the requirements of this Consent Decree within the time limits set forth in this Consent Decree unless the performance is prevented or delayed solely by events which constitute a force majeure.

50. A force majeure event is defined as any event arising from causes not reasonably foreseeable and beyond the control of the City and WMU or its consultants, engineers, or contractors which could not be overcome by due diligence and which delays or prevents performance as required by this Consent Decree.

51. Force majeure events do not include unanticipated or increased costs of performance, financial inability to perform an obligation required by this Consent Decree, or failure of a contractor to perform or failure of a supplier to deliver unless such failure is, itself, the result of force majeure.

52. The City and WMU shall notify the Cabinet's Director of the Division of Enforcement and EPA's Chief of the Water Programs Enforcement Branch by telephone within 10 business days and in writing within 15 business days after it becomes aware of events which it knows or should reasonably know may constitute a force majeure. The notice shall provide an estimate of the anticipated length of delay, including any necessary period of time for demobilization and remobilization of contractors or equipment; a description of the cause of delay; a description of measures taken or to be taken by the City and WMU to minimize delay, including a timetable for implementing these measures.

53. Failure to comply with the notice provision shall be grounds for EPA to deny granting an extension of time to the City and WMU. If any event is anticipated to occur which may cause a delay in complying with the terms of this Consent Decree, the City and WMU shall promptly notify the Cabinet's Director of the Division of Enforcement and EPA's Chief of the Water Programs Enforcement Branch in writing within 10 business days of learning of the possibility of a force majeure event, if the event has not already occurred. After consulting with the Cabinet, EPA will respond in writing to any written notice received.

54. If the City and WMU reasonably demonstrate to EPA that the delay has been or will be caused by a force majeure event, after consulting with the Cabinet, EPA will extend the time for performance for that element of the Consent Decree for a period not to exceed the delay resulting from such circumstances. Stipulated penalties shall not accrue for any such period of delay resulting from a force majeure event.

55. If a dispute arises over the occurrence or impact of a force majeure event and cannot be resolved, EPA reserves the right to seek enforcement of this Consent Decree and the City and WMU reserve the right to invoke the dispute resolution provisions of this Consent Decree. In any such dispute, the City and WMU shall have the burden of proof that a violation of this Consent Decree was caused by a force majeure event.

#### **XV. COST OF SUIT**

56. The Parties shall bear their own costs and attorneys' fees with respect to matters related to this Consent Decree, with the following exception. In the event that the United States must enforce this Consent Decree with judicial intervention, the City and WMU shall pay all attorneys' fees and costs incurred by the United States if the United States prevails in whole or part on the issue for which enforcement is sought.

#### **XVI. CERTIFICATION OF SUBMISSIONS**

57. In all notices, documents or reports submitted pursuant to this Consent Decree, the City and WMU shall, by a responsible party of each, as defined by 40 C.F.R. § 122.22, sign and certify each such notice, document and report as follows:

I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering such information, the information submitted is, to the best of my knowledge and belief, true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

#### **XVII. RIGHT OF ENTRY**

58. EPA and the Cabinet and their authorized representatives and contractors shall have authority at all times, upon the presentation of proper credentials, to enter the

premises of the City and WMU to:

- (a) Monitor the work required by this Consent Decree;
- (b) Verify any data or information submitted to EPA or the Cabinet;
- (c) Obtain samples from any portion of the Sewer System or WWTP;
- (d) Inspect and evaluate any portions of the Sewer System or WWTP;
- (e) Inspect and review any records required to be kept under the terms and conditions of this Consent Decree or any KPDES permit, the CWA and KRS Chapter 224 and regulations promulgated pursuant thereto; and
- (f) Otherwise assess the compliance of the City and WMU with state and federal environmental laws and this Consent Decree.

The rights created by this Paragraph are in addition to, and in no way limit or otherwise affect, the authority of EPA or the Cabinet to conduct inspections, to require monitoring and to obtain information from the City and WMU as authorized by law.

#### **XVIII. RECORD RETENTION**

59. The City and WMU shall retain all data, documents, plans, records and reports that relate to their performance under this Consent Decree which are in the possession, custody, or control of the City, WMU, or its consultants or contractors. The City and WMU shall retain all such materials for 5 years from the date of origination. Drafts of final documents, plans, records, or reports do not need to be retained. This Paragraph does not limit or affect any duty or obligation of the City or WMU to maintain records or information required by any KPDES permit. At the conclusion of this retention period, the City and WMU shall notify EPA and the Cabinet at least 120 days prior to the destruction of any such materials, and upon request by either of these Parties,

the City and WMU shall deliver any such materials to that Party.

**XIX. PUBLIC COMMENTS**

60. The Parties agree and acknowledge that final approval of this Consent Decree by the United States and the Commonwealth, and entry of this Consent Decree by the Court, are subject to the requirements of 28 C.F.R. § 50.7, which provides for notice of the lodging of this Consent Decree in the Federal Register, an opportunity for public comment, and consideration of any comments. The City and WMU hereby agree not to withdraw from, oppose entry of, or challenge any provision of this Consent Decree, unless the United States or the Cabinet has notified the City and WMU in writing that it no longer supports entry of the Consent Decree.

**XX. CONTINUING JURISDICTION**

61. The Court shall retain jurisdiction to effectuate and enforce the terms and conditions and achieve the objectives of this Consent Decree, and to resolve disputes arising hereunder as may be necessary or appropriate for the construction, modification, implementation, or execution of this Consent Decree.

**XXI. SIGNATORIES**

62. The signatories for the Parties certify that they are fully authorized to enter into the terms and conditions of this Consent Decree and to execute and legally bind such Parties to this document.

63. The agents identified on the attached signature pages for the City and WMU are authorized to accept service of process by mail on behalf of the City and WMU with respect to all matters arising under or related to this Consent Decree. The City agrees to accept service of process of the complaint in that manner and to waive the

formal service and notice requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and any applicable local rules of this Court, including but not limited to service of a summons.

## **XXII. MISCELLANEOUS PROVISIONS**

64. Unless otherwise specified, or as may be changed from time to time, all reports, notices, or any other written communications required to be submitted under this Consent Decree by the City and WMU to EPA and the Cabinet shall be sent to following addresses:

As to EPA:

Chief, Environmental Enforcement Section  
Environment and Natural Resources Division  
U.S. Department of Justice  
Post Office Box 7611  
Washington, D.C. 20044-7611  
Reference DOJ Case No. 90-5-1-1-08591

Chief, Water Programs Enforcement Branch  
Water Management Division  
U.S. Environmental Protection Agency,  
Region 4  
Atlanta Federal Center  
61 Forsyth Street, S.W.  
Atlanta, Georgia 30303

For verbal notifications: Doug Mundrick, Chief, Water Programs Enforcement Branch, (404) 562-9328

As to Cabinet:

Director, Division of Enforcement  
Department for Environmental Protection  
Environmental and Public Protection Cabinet -  
14 Reilly Road, Frankfort, Kentucky 40601

For verbal notifications: Susan Green, Director, Division of Enforcement, (502) 564-2150.

65. All notices to the City required by this Consent Decree shall be sent to Kenneth Kerns, City Manager, PO Box 40 and 32 Wall Street, Winchester KY 40392-0040, unless otherwise designated in writing by the City. All notices to WMU required by this Consent Decree shall be sent to Vernon Azvedo, General Manager, PO Box 4177 and 150 W. Main Street, Winchester KY 40392-4177, unless otherwise designated in writing by WMU

66. Notifications to, or communications with, the Parties shall be deemed submitted on the date they are postmarked and sent by certified mail, return receipt requested, or deposited with an overnight mail/delivery service.

67. This Consent Decree is entered in full and final settlement of the civil claims for violations of the CWA as alleged in the complaints filed by the United States and the Commonwealth up through the date of entry of this Consent Decree, but shall not affect rights or obligations not specifically addressed herein, as to which the Parties specifically reserve their rights. The United States and the Commonwealth enter into this Consent Decree, in part, based upon information supplied by the City and WMU. Nothing contained herein shall be construed to waive or limit any remedy or cause of action by the United States or the Commonwealth based on statutes or regulations under its jurisdiction, and the City and WMU reserve their defenses thereto, except that the City and WMU shall not use this Consent Decree as a defense. EPA and the Cabinet reserve their rights at any time to issue administrative orders or to take any other action they each deem necessary, including the right to order all necessary remedial measures, assess penalties for violations or recover any response costs that may be incurred, and the City

and WMU reserve their defenses thereto, except that the City and WMU shall not use this Consent Decree as a defense.

68. This Consent Decree shall not prevent EPA or the Cabinet from issuing, reissuing, renewing, modifying, revoking, suspending, denying, terminating, or reopening any permit issued to the City or WMU. The City and WMU shall not use this Consent Decree as a defense to those permit actions.

69. The City and WMU waive their rights to any hearing on the matters set forth in the complaints. Failure by the City and WMU to comply strictly with the terms of this Consent Decree shall be grounds for EPA or the Cabinet to seek enforcement of this Consent Decree in this Court and to pursue any other appropriate administrative or judicial action under the CWA or KRS Chapter 224, and the regulations promulgated pursuant thereto.

70. Each separate provision, condition or duty contained in this Consent Decree may be the basis for an enforcement action for a separate violation and penalty pursuant to the CWA, upon the failure to comply with the terms of this Consent Decree.

71. The terms and conditions stated herein are intended to be implemented as a whole and may not be challenged independently. Except as set forth below, this Consent Decree may not be materially amended or modified except by written agreement of the Parties, and approval of this Court. Any material modification of this Consent Decree shall be effective upon approval of the Court. Non-material modifications of the obligations of the Parties which do not significantly alter the terms of this Consent Decree, such as changes to schedules or interim deadlines for any project to be



implemented pursuant to a submittal required by this Consent Decree, may be made in writing by the Parties.

72. EPA and the Cabinet do not, by their consent to the entry of this Consent Decree, warrant or aver in any manner that the complete compliance of the City and WMU with this Consent Decree will result in compliance with the provisions of the CWA or KRS Chapter 224 and the regulations promulgated pursuant thereto, nor with any permit. Notwithstanding EPA's and the Cabinet's review and EPA's approval of any plans formulated pursuant to this Consent Decree, the City and WMU shall remain solely responsible for compliance with the CWA, the terms of KRS Chapter 224 and the regulations promulgated pursuant thereto, this Consent Decree and any permit requirements. This Consent Decree is not and shall not be construed as a permit, nor a modification of any existing permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342, nor shall it in any way relieve the City and WMU of their obligations to obtain permits for the WWTP and related operations or facilities and to comply with the requirements of any KPDES permit or with any other applicable state or federal law or regulation, including the provisions of 401 KAR 5:005. Any new permit, or modification of existing permits, shall be complied with in accordance with applicable state or federal laws and regulations.

73. The provisions of this Consent Decree shall apply to and be binding upon the City and WMU. The acts or omissions of their officers, directors, agents, servants and employees shall not excuse their performance of any provision of this Consent Decree. EPA and the Cabinet reserve their rights to seek enforcement of this Consent Decree against the successors and assigns of the City and WMU, and the City and WMU

reserve their defenses thereto. The City and WMU shall give notice of this Consent Decree to any purchaser, lessee or successor-in-interest prior to the transfer of ownership and/or operation of all or any portion of the Sewer System or the WWTP occurring prior to termination of this Consent Decree, shall notify EPA and the Cabinet that such notice has been given, and shall follow all statutory and regulatory requirements for a transfer. Whether or not a transfer takes place, the City and WMU shall remain fully responsible for payment of all civil penalties, stipulated penalties, and for performance of all remedial measures identified in this Consent Decree.

74. By agreeing to the terms and conditions of this Consent Decree, the City and WMU are not waiving any rights, claims or causes of action against third parties that it may have that arise from, or relate to the matters addressed in this Consent Decree.

75. The Parties acknowledge and agree that the terms and conditions of this Consent Decree are facility-specific and are designed specifically for the unique characteristics of the wastewater conveyance system of the City and WMU and the factual circumstances of this case. The language of this Consent Decree is specifically tailored for the system of the City and WMU.

76. The Consent Decree is subject to termination on the date that the City and WMU certify that they have met all requirement of this Consent Decree, including, without limitation, (a) completion of all SEPs, (b) payment of all penalties and stipulated penalties due, (c) submission and approval of all plans required in Section VI or in any amendment to this Consent Decree, and (d) completion of all work and implementation of all the requirements in the plans required in Section VI of this Consent Decree or in any amendment to this Consent Decree. EPA's determination that the Consent Decree

should be terminated shall be based on a consideration of whether all of the requirements listed above have occurred, after consultation with the Cabinet.

77. The City and WMU may request that the EPA make a determination that this Consent Decree be terminated. Any such request shall be in writing and shall include a certification that the requirements listed in the above Paragraph have been met. The City and WMU shall serve a copy of any such request on the Cabinet through the office of the Director of the Division of Enforcement and EPA through the Director of the EPA Region 4 Water Division. If the EPA agrees, after consultation with the Cabinet, that the City and WMU have met all of the requirements listed above, the Parties shall file a joint motion with the Court seeking an order terminating the Consent Decree. If the EPA determines, after consulting with the Cabinet, not to seek termination of the Consent Decree because all of the requirements listed above were not met, it shall so notify the City and WMU in writing. The notice shall summarize the basis for its decision and describe the actions necessary to achieve final compliance. If the City and WMU disagree with any such determination by EPA, they shall invoke the dispute resolution procedures of this Consent Decree before filing any motion with the Court regarding the disagreement.

**XXIII. RESCISSION OF AGREED ORDER**

78. On June 25, 2004, the Cabinet entered into an Agreed Order with the City and WMU for the performance of certain remedial measures. The Cabinet has determined that the entry of this Consent Decree shall rescind the Agreed Order as of the date of entry. The obligations of the City and WMU under the Agreed Order shall thus terminate on the date of entry of this Consent Decree.

So ORDERED, this \_\_\_\_\_ day of \_\_\_\_\_, 2006.

\_\_\_\_\_  
UNITED STATES DISTRICT JUDGE

THE UNDERSIGNED Party enters into this Consent Decree, subject to the public notice requirements of 28 C.F.R. § 50.7, and submits it to the Court for entry.

FOR THE UNITED STATES OF AMERICA:

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SUE ELLEN WOOLDRIDGE  
Assistant Attorney General  
Environment and Natural Resources Division  
United States Department of Justice

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PATRICIA L. HURST (COUNSEL OF RECORD)  
Trial Attorney  
Environmental Enforcement Section  
Environment and Natural Resources Division  
United States Department of Justice  
Post Office Box 7611  
Washington, D.C. 20044  
Telephone: (202) 307-1242  
Facsimile: (202) 514-2583

GREGORY F. VAN TATENHOVE  
United States Attorney

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ANDREW SPARKS (COUNSEL OF RECORD)  
Assistant United States Attorney  
Eastern District of Kentucky  
110 West Vine Street  
Lexington, KY 40507  
Telephone: (859) 233-2661, ext 148  
Facsimile: (859) 233-2533

THE UNDERSIGNED Party enters into this Consent Decree, subject to the public notice requirements of 28 C.F.R. §50.7, and submits it to the Court for entry.

FOR THE UNITED STATES OF AMERICA:

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MARY KAY LYNCH  
Regional Counsel  
United States Environmental Protection Agency  
Region 4  
61 Forsyth Street  
Atlanta, GA 30303  
Telephone: (404) 562-9556  
Facsimile: (404) 562-9663

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WILLIAM B. BUSH, JR.  
Assistant Regional Counsel  
United States Environmental Protection Agency  
Region 4  
61 Forsyth Street  
Atlanta, GA 30303  
Telephone: (404) 562-9538  
Facsimile: (404) 562-9487

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MARK POLLINS  
Director  
OECA - Office of Civil Enforcement  
Water Enforcement Division (2243-A)  
United States Environmental Protection Agency  
1200 Pennsylvania Avenue, NW  
Washington, DC 2046  
Telephone: (202) 564-4001  
Facsimile: (202) 564-0018

THE UNDERSIGNED Party enters into this Consent Decree, subject to the public notice requirements of 28 C.F.R. § 50.7, and submits it to the Court for entry.

FOR THE COMMONWEALTH OF KENTUCKY,  
ENVIRONMENTAL & PUBLIC PROTECTION  
CABINET:

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TERESA J. HILL, Secretary

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BRENDA LOWE (COUNSEL OF RECORD)  
SHARON VRIESENKA  
Office of Legal Services  
5<sup>TH</sup> Floor, Capital Plaza Tower  
Frankfort, KY 40601  
Telephone: (502) 564-5376  
Facsimile: (502) 564-6131

THE UNDERSIGNED Party enters into this Consent Decree, subject to the public notice requirements of 28 C.F.R. § 50.7, and submits it to the Court for entry.

FOR THE CITY OF WINCHESTER,  
KENTUCKY:

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DODD DIXON  
Mayor, City of Winchester  
PO Box 40  
Winchester, KY 40392-0040  
Telephone: (859) 744-2821  
Facsimile: (859) 745-4590



THE UNDERSIGNED Party enters into this Consent Decree, subject to the public notice requirements of 28 C.F.R. § 50.7, and submits it to the Court for entry.

FOR WINCHESTER MUNICIPAL UTILITIES:

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DEXTER NOBLE

Chairman

Winchester Municipal Utilities Commission

PO Box 4177

Winchester, KY 40392-4177

Telephone: (859) 744-8301

Facsimile: (859) 745-4146